IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.218 OF 2006

Smt.Sunita Shinde and others ..Appellants

V/s.

M/s.Ashwini Co-operative Housing Society Ltd. and others ..Respondents

Mr.S.J.Chitale, advocate for the appellants
Mr.Kshirsagar, advocate for respondent Nos.1 to 4

Coram : D.G.Karnik, J

Date : 21st November, 2006

P.C.

1. Heard learned counsel for the parties. This appeal is directed against the order dated 3rd January, 2006 passed by the 9th Joint Civil Judge Junior Division, Pune dismissing application of the appellants made under O.9, R.9 of the C.P.C. for restoration of the suit by setting aside the order of dismissal in default.

2. The present appellants are the heirs of Laxmanrao Shankarrao Shinde, the original plaintiff. Special Civil Suit No.514 of 1996 filed

by Laxmanrao was dismissed for his non appearance by an order dated 16th August, 2002. Laxmanrao filed an application for restoration, bearing Miscellaneous Application No.655 of 2002. Respondents opposed the application. By an order dated 3rd January, 2006 the restoration application was dismissed. That order is impugned in this appeal.

3. Learned counsel for the appellants submitted that on 16th August, 2002 Laxmanrao was ill and an application for adjournment was made along with a medical certificate. The Court however, rejected the application and dismissed the suit. Learned counsel for the appellants further submitted that in view of the medical certificate the trial Court ought to have believed that the plaintiff was ill and ought not to have dismissed the suit in default by rejecting the application for adjournment. He relied upon the decision of this Court in **Chandrabhaga Damodar Vanjari Vs. Priyanka Murlidhar Navathe & others, reported in 2006(5) ALL MR 377**.

4. Learned counsel for the respondents submitted that no medical certificate was filed along with the application for adjournment and therefore, the trial Court was right in dismissing the suit in default. In any event, he submitted, in this appeal we are not concerned whether the trial Court was right in rejecting the application for adjournment but are required to see whether there was sufficient cause for absence of Laxmanrao on 16th August, 2002. In my view what is required to be seen is whether the order of the trial Court rejecting the application for restoration the suit is just and proper.

5. Learned counsel for the respondents further submitted that in any event in view of the subsequent developments it is not necessary to interfere in the order of the dismissal passed by the trial Court. He further submitted that Laxmanrao died on 18th November, 2005 and his heirs were not brought on record of the restoration application and of the suit. As the heirs were not brought on record restoration application stood abated after the expiry of statutory period of 90

days. No application for setting aside the abatement and condonation of delay was made. Abatement has become final. Therefore, restoration application itself is not maintainable.

6. I have perused a copy of the application for restoration annexed to appeal memo. The copy shows that heirs of Laxmanrao were not brought on record. Learned counsel for the appellants admitted that the copy annexed to the appeal memo is a true copy of the Miscellaneous Civil Application which shows that heirs of Laxmanrao were not brought on record inspite of his death on 18th November, 2005. In the circumstances, Miscellaneous Civil Application stood abated on expiry of period of 90 days and the restoration application itself was not maintainable. The objection raised by learned counsel for the respondents is therefore, accepted as the restoration application itself had abated. In view of this there is no merit in the appeal which is hereby dismissed.

(D.G.Karnik, J.)